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No. 91-1600

Supreme Court, U.S.
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,
v.

WALTER F. BIGGINS,
RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals
For The First Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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ARGUMENT

Petitioners Hazen Paper Company, Thomas Hazen and Robert N. Hazen respectfully call the Court's attention to guidelines recently published by the Equal Employment Opportunity Commission (the "EEOC") entitled "Enforcement Guidance: Compensatory and Punitive Damages Available Under §102 of the Civil Rights Act of 1991" (hereinafter "EEOC Enforcement Guidance").¹

The EEOC Enforcement Guidance sets forth the position of the amicus curiae EEOC on the legal standards for awarding punitive

¹ For the convenience of the Court, the pertinent provisions of the EEOC's publication (pps. 15-18) are included in the Appendix to this Supplemental Brief.

damages pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. §1981A. In Section II(B)(1) of the Enforcement Guidance, the EEOC identifies various factors which, in its view, would warrant the imposition of punitive damages to redress violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 et seq.² These factors include:

- (1) "[t]he degree of egregiousness and nature of the [employer's] conduct";³
- (2) "[t]he nature, extent, and severity of the harm to the complaining party";
- (3) "[t]he duration of the discriminatory conduct";⁴
- (4) "[t]he existence and frequency of similar past discriminatory conduct by the [employer]";⁵
- (5) whether the employer "planned and/or attempted to conceal or cover up the discriminatory practices";

² Echoing the position advanced by Petitioners before this Court, the EEOC correctly observes that "[a] finding of liability does not itself entitle a plaintiff to an award of punitive damages" (quotation omitted), and likewise notes that "[p]unitive damages are awarded to punish the respondent and to deter further discriminatory conduct." Id. §II(B)(1), at p. 15.

³ On this point, the guidelines further state that "[c]onduct which is shocking or offends the conscience is egregious and warrants punitive damages." Id. at p. 16.

⁴ The guidelines amplify this consideration by pointing out that "an extended period of discriminatory conduct suggests an official policy of discrimination" on the part of the company, and thus greater blameworthiness. Id. at p. 17 (quotation omitted).

⁵ As an example, the guidelines state that "if there is a continuing pattern of harassment by the [employer], it may be sufficient to find malice or reckless indifference." Id. at p. 17.

- (6) whether the employer "ha[d] notice of discriminatory conduct and fail[ed] to take action"; and
- (7) whether the employer engaged in "threats or deliberate retaliatory action" against a complaining party.

See EEOC Enforcement Guidance §II(B)(1), at pp. 15-18.

Petitioners respectfully submit that the EEOC's enforcement guidelines shed light on the appropriate standard to be applied when awarding liquidated damages under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (the "ADEA"). Given the textual similarities between Title VII and the ADEA, see Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979), and given this Court's conclusion that ADEA liquidated damages were meant to be "punitive in nature," see Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985), the same criteria identified by the EEOC should govern an award of liquidated damages under the ADEA.

In their principal brief to this Court, Petitioners set forth a test for awarding liquidated damages under the ADEA which anticipates the very standards articulated by the EEOC for imposing analogous punitive damages for violations of Title VII. This test, which focuses on the egregiousness of the employer's conduct, the severity of the harm visited upon the plaintiff, and the existence vel non of a pattern of repeated harassment or discriminatory conduct by the employer, effectuates what Congress intended to be the punitive function of liquidated damages. Such a test should accordingly be adopted by this Court for use under the ADEA.

Respectfully submitted,

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Dated: December 17, 1992

APPENDIXEQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ENFORCEMENT GUIDANCE: COMPENSATORY AND
PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE
CIVIL RIGHTS ACT OF 1991

...

B. Punitive Damages

Punitive damages are awarded to punish the respondent and to deter future discriminatory conduct. They are not available against a federal, state, or local government, a government agency, or a political subdivision. Punitive damages are available only where the respondent acted with "malice or with reckless indifference to the federally protected rights of an aggrieved individual." Section 1981A(b)(1).

This standard is consistent with § 1981 and therefore should be interpreted consistently.¹ The standard for awarding punitive damages under § 1981 is whether the defendant acted with malice, an evil motive, or recklessness or callous indifference to a federally protected right. Stephens v. South Atlantic Cannery, Inc., 848 F.2d 484, 489, 46 EPD ¶ 38,032 (4th Cir. 1988), cert. denied, 488 U.S. 996 (1988). Additionally, under § 1983, plaintiffs may recover punitive damages when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983); Garza v. City of Omaha, 814 F.2d 553, 556, 43 EPD ¶ 37,072 (8th Cir. 1987) (punitive damages under § 1983 "may be awarded where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard for the civil rights of the plaintiff").

¹ "Punitive damages are available under [§ 1981A] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed." Representative Edwards' Interpretative Memorandum, 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991).

1. Determining Malice or Reckless Disregard

A "finding of liability does not of itself entitle a plaintiff to an award of punitive damages." Yarbrough v. Tower Oldsmobile, 789 F.2d 508, 514, 40 EPD ¶ 36,216 (7th Cir. 1986). However, conscious, purposeful discrimination may be sufficient to warrant punitive damages.² As the First Circuit has observed, "can it really be disputed that intentionally discriminating against a [B]lack man on the basis of his skin color is worthy of some outrage?" Rowlett v. Anheuser-Busch, 832 F.2d 194, 206, 44 EPD ¶ 37,428 (1st Cir. 1987). In Brown v. Freedman Baking Company, 810 F.2d 6, 42 EPD ¶ 36,779 (1st Cir. 1987), punitive damages were warranted for three Black plaintiffs, after two plaintiffs were fired because a manager believed that it "just doesn't look good" for too many Blacks to work in the main store. The third plaintiff complained and was told that when too many Blacks get together "they get arrogant." He was fired when he provided a statement to the EEOC on the other plaintiffs' behalf. The court stated that it "would not be unreasonable for the jury to view such conduct as outrageous and deserving of substantial punitive damages." Id. at 11.

A number of factors may be considered to determine whether conduct was committed with malice or reckless indifference to the complaining party's federally protected rights. This evidence is likely to have already been obtained during the liability phase of the investigation. The list is nonexclusive and other relevant factors may also be considered.

1. The degree of egregiousness and nature of the respondent's conduct should be considered. See Restatement (Second) of Torts,

² Malice is defined as "a condition of mind which prompts a person to do a wrongful act wilfully, that is, on purpose, to the injury of another." Black's Law Dictionary 862 (5th ed. 1979). Thus, discriminatory conduct "is maliciously done if prompted or accompanied by ill will... either toward the injured person individually or toward all persons in one or more groups ... of which the injured person is a member." Soderbeck v. Burnett County, 752 F.2d 285, 289 (7th Cir. 1985), cert. denied, 471 U.S. 1117 (1985).

§ 908(2). In EEOC v. Gaddis, 733 F.2d 1373, 1380, 34 EPD ¶ 34,348 (10th Cir. 1984), the court held that allowance of punitive damages "involves an evaluation of the nature of the conduct in question." The respondent had made an employment offer to the plaintiff, an out-of-state resident, based upon a recommendation by another employee. Plaintiff accepted the position and his name was posted on an assignment board as a new employee. The respondent met the plaintiff for the first time when he reported for work. The respondent was visibly upset when he discovered that the plaintiff was Black and stated that a Black person would never be allowed to work in the office. The plaintiff worked for several days and was fired. The respondent stated that no vacancy existed, although it subsequently hired two White males for the position. The court determined that this conduct warranted punitive damages.

Conduct which is shocking or offends the conscience is egregious and warrants punitive damages. For example, CP's supervisor often asks CP for dates and sometimes makes sexual remarks to her, although CP has repeatedly asked him to leave her alone. The supervisor finally tells CP, who is the most qualified person for an upcoming promotion, that if she wants the promotion she must have sex with him. The supervisor's conduct may be considered "shocking."

2. The nature, extent, and severity of the harm to the complaining party should be considered. The Restatement (Second) of Torts, § 908(2); Keenan v. City of Philadelphia, 55 FEP Cases 932, 943 (E.D. Pa. 1991).

3. The duration of the discriminatory conduct is relevant. For instance, an extended period of discriminatory conduct "suggests an official policy of discrimination as opposed to the work of a renegade supervisor." Williamson v. Handy Button Machine Company, 817 F.2d at 1296. Evidence that the respondent tolerated or condoned the discriminatory conduct over a period of time could constitute malice and/or reckless indifference.

4. The existence and frequency of similar past discriminatory conduct by the respondent should be considered. For example, if

there is a continuing pattern of harassment by the respondent, it may be sufficient to find malice or reckless indifference.

5. Evidence that the respondent planned and/or attempted to conceal or cover-up the discriminatory practices or conduct is relevant.

6. The employer's actions after it was informed of discrimination should be considered. An employer who has notice of discriminatory conduct and fails to take action could incur punitive damages. See Yarbrough v. Tower Oldsmobile, 789 F.2d at 514-15 (punitive damages warranted under § 1981 where the plaintiff testified that his supervisor reprimanded him in writing, without cause, and transferred him to a less desirable work area after saying "[w]e don't want no Black guy in the front of the shop;" the plaintiff brought his complaints of discrimination to management, who failed to respond and was found to be "indifferent to his federally protected rights").

7. Proof of threats or deliberate retaliatory action against complaining parties for complaints to management or filing a charge normally will constitute malice. Hunter v. Allis-Chalmers, 797 F.2d 1417, 1425, 41 EPD ¶ 36,417 (7th Cir. 1986) (punitive damages warranted where the defendant had deliberately fired a worker for making well-founded complaints with a state FEP agency about persistent acts of racial harassment); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1260, 37 EPD ¶ 35,317 (6th Cir. 1985) (manager's threat to hurt plaintiff economically for pursuing his complaints of harassment may constitute malice), cert. denied, 475 U.S. 1015 (1986).